No. 12,027

IN THE

United States Court of Appeals

For the Ninth Circuit

Estate of FRANK K. SULLIVAN, deceased, by FLOYD K. SULLIVAN, Executor,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF OF AMICI CURIAE

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PRELIMINARY STATEMENT OF PURPOSE AND SCOPE OF BRIEF

Pursuant to leave of this Court, the undersigned attorneys file this brief as amici curiae. We do not act on behalf of any specific clients, but believe that certain legal issues are of importance to various taxpayers whom we represent as well as to taxpayers generally. On these issues we consider that the Tax Court committed serious errors which, in effect, read into the Federal estate tax laws, without support from Congress, a nullification of a wife's rights in joint tenancy property.

The Tax Court in this case held that:

1. All the transactions in which Frank K. Sullivan, hereinafter called the "decedent," participated were done by him in contemplation of death.

2. The transaction which consisted of the division or partition of joint tenancy properties belonging to decedent and his wife as equal joint tenants, whereby each took one half as separate property, was a "transfer" by decedent to his wife of the wife's half "interest" (which had been vested in her before the transaction) within the meaning of the terms "transfer" and "interest" in Section 811(c);* (this holding by the Tax Court is not expressly set out in the opinion nor is there any discussion of it, but it is implicit in the decision that Section 811(c) applies);

3. Such "transfer" by such partition of joint tenancy properties was not "a bona fide sale for an adequate and full consideration in money or money's worth" within the provision of Section 811(c); and

4. A gift made by the decedent and his wife to their son, consisting of property held by the two donors as joint tenants, was to be deemed entirely made by decedent under Section 811(c) and not in any part by his wife, despite her vested half interest.

The Tax Court's conclusion on the basis of these four holdings was that all the properties involved in these transactions were to be included 100% in decedent's taxable estate.

We do not propose to take any position with respect to the first holding, i.e., contemplation of death. Since it is dependent on the particular facts as to decedent's state of mind, as well as the two-year statutory presumption, we do not consider this holding important to our clients or to taxpayers generally. We shall therefore assume in this brief that the Tax Court was correct in such holding, although we do not thereby intend to express any views of our own on this subject. If this Court shall hold that the transfer was not in contemplation of death that is an end of the case.

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*Unless otherwise noted, all references to Sections and subsections are to the Internal Revenue Code. The provisions mentioned are quoted in the Appendix hereto.

We do, however, disagree completely with holdings 2 and 3, above outlined, and we propose to demonstrate that they are both erroneous. We are also of the view that holding 4 is wholly unsupported by legal principles, but we are not primarily concerned with that holding and therefore we shall not discuss it.*

THE FACTS WITH RESPECT TO THE POINTS ARGUED HEREIN

Disregarding the facts as to contemplation of death, with which we are not concerned, the facts with respect to the points herein argued are quite simple. As set out in the findings of the Tax Court (10 T.C. 962-7, R. 91-101), which we accept as correct, they are:

All the properties involved were reinvestments of properties originally acquired by the decedent as his separate property while he and his wife resided in Minnesota. The decedent and his wife came to California in 1922 and thereafter both resided in California until his death January 9, 1944. Shortly before and shortly after the move to California in 1922, decedent invested his assets in California real and personal properties, most of which were taken in the names of his wife and himself as joint tenants.† There is no question but that decedent intended a true joint tenancy and thus at that time transferred what was previously his separate property into ownership by his wife and himself as equal joint tenants.

On November 24, 1943, the decedent (assumed to have been acting in contemplation of his death) and his wife made an

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*One other minor holding appears in the *Sullivan* case. This is that the taxable estate included the sum of $2400 in a joint bank account, which entire amount decedent's wife checked out and deposited in another bank account in her own name shortly prior to decedent's death and without either his consent or his knowledge, so far as appears. We are not concerned with this issue nor shall we discuss it in this brief.

†We are only concerned with these joint tenancy properties and from here on will disregard the few properties which remained in the husband's own name and thus, aside from some special understanding, were his separate property at the time of the transaction in question.

agreement which recited that they desired to terminate the joint tenancies, and as the Tax Court said in its findings (10 T.C. 965; R. 97-8): "The contract then provided, with recited assignments to make it effective, that on and after the date it bore the real and personal property owned by them, whether held as joint tenants or in his or her own name, would be owned by them by undivided one-half interests as separate property." (see also R. 19-24, 187 and 189).*

The result of this agreement was that each of the various assets which had been held in joint tenancy was partitioned between the two spouses, each owning half as his or her separate property. The record shows that most of the properties were thereafter held by the decedent and his wife as equal tenants in common (R. 29, 35-7, 68-90 and 160-1). Four securities, aggregating a comparatively small part of the values involved, were agreed to be divided in kind, and they or their proceeds were subsequently divided between decedent's estate and the widow (R. 29, 37, 139-141, 204-8). Strictly speaking, only these four securities so divided in kind were really the subject of a true "partition"; as to all the other properties, the transaction was merely a transmutation from joint tenancy to tenancy in common and decedent and his wife each owned the same undivided half interest after this change as before—the only difference being that the possibility that either might take the

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*The agreement itself was, of course, entirely sufficient to terminate the incident of survivorship without the subsequent deeds or assignments. It is settled that any agreement between joint tenants which is inconsistent with an estate in joint tenancy has the effect of terminating the joint tenancy and making the parties tenants in common.

McDonald v. Morley (1940) 15 C.2d 409,

where the joint tenants were husband and wife and the court held:

> "* * * by their contract the parties specifically provided that if either one of them died, the interest of that one should not go to the survivor but to the daughter. This is entirely inconsistent with an estate in joint tenancy, which was thereby terminated. (*Delanoy v. Delanoy,* 216 Cal. 23 [13 Pac.(2d) 513].) Thereafter, Mr. and Mrs. McDonald were tenants in common with separate descendible interests."

other's half on survivorship had been terminated. However, for convenience, we shall call this transmutation a partition or severance throughout this brief and we shall not hereafter take up separately the four securities divided in kind.

It should be mentioned that no question arises in the case with respect to the husband's half of the joint tenancy properties so partitioned to him. Such half remained his separate property until his death and was included in his taxable estate by his executor without question, not as a transfer under Section 811(c) but as property owned at death (R. 30-31). This tax controversy involves only the wife's half, owned by her both before and after the partition.

STATUTORY PROVISIONS

The provisions of the Internal Revenue Code in effect at the times of the transaction involved in this case and also at the date of decedent's death and referred to in this brief are quoted in the Appendix hereto. They include Sections 810, 811(a), (c), (d)(5), (e)(1) and (2).

ARGUMENT

I. The Correct Interpretation of the Applicable General Terms of the Federal Estate Tax Statutes Depends on the Substantive Rights of Decedent's Wife in the Joint Tenancy Properties Before and After the Transaction in Question; in the Case of California Property Owned by Husband and Wife as Joint Tenants, the Wife's Substantive Rights Amount to a Vested Half Interest Recognized Both by the Local Law, Which Governs Property Rights, and by the Federal Tax Law; Thus the Decedent's Wife Did Not Acquire Anything of Substance by the Partition of Properties.

Before discussing the provisions of the Federal estate tax statutes themselves, it is important to ascertain what the transaction in this *Sullivan* case did in the way of changing the basic rights of decedent and his wife. Therefore, we start with an analysis of the wife's rights in the joint tenancy properties before the transaction occurred. These rights depend, of course, on California property law.*

A. JOINT TENANTS ARE EQUAL CO-OWNERS, LIKE TENANTS IN COMMON, DURING THE LIFETIME OF BOTH.

The rights of the wife in joint tenancy property in California are well established and are generally the same as in the case

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*We appreciate that the characterization of rights under local law cannot be finally controlling in the interpretation of a Federal tax law, such as Section 811. But where the questions under the Federal statutes are those raised by the wording of Section 811 (c), namely, whether there has been a "transfer" and, if so, what "interest" has been transferred and for what "consideration," then the substance of what the transaction is becomes important, and that depends, of course, on the local property law. See, for example, the cases which passed on the constitutionality—and before that, the meaning—of the taxes on co-ownership properties at the death of the husband, such as tenancy by the entirety, joint tenancy and community property, namely, *Tyler v. U. S.* (1930) 281 U.S. 497; *U. S. v. Jacobs* (1939) 306 U.S. 363; and *Fernandez v. Wiener* (1945) 326 U.S. 340, which thoroughly canvassed the local law before applying the federal law, and which are further explained below in this Brief (pp. 34-39).

of joint tenancies in other jurisdictions. Disregarding for the moment the effect of death, i.e., survivorship, a joint tenancy between husband and wife in California constitutes each party the owner of an undivided half interest as his or her separate property, and not as community property.*

> *Siberell v. Siberell* (1932) 214 Cal. 767;
> *Reiss v. Reiss* (1941) 45 Cal. App. (2d) 740;
> *Conard v. Conard* (1935) 5 Cal. App. (2d) 91;
> *Estate of Frary* (1938) 26 Cal. App. (2d) 83.

Each of the joint tenants is therefore entitled to an equal share in possession of the property if it is of a type permitting such possession.

> *Estate of Gurnsey* (1918) 177 Cal. 211;
> *Swartzbaugh v. Sampson* (1936) 11 Cal. App. (2d) 451;
> *Noble v. Manatt* (1919) 42 Cal. App. 496.

And if it is income producing property, each is entitled to one-half of the income received from third parties.

> *Estergren v. Sager* (1940) 39 Cal. App. (2d) 401;
> *Swartzbaugh v. Sampson,* above;
> *McWhorter v. McWhorter* (1929) 99 Cal. App. 293.

Furthermore, since each half of the property is separate property, such income from the property belongs one-half to the husband and one-half to the wife as his or her separate income; this follows from the California cases first listed above.

The half interest of the wife as joint tenant is not confined to income, however. It is a one-half ownership of the capital or principal of the joint tenancy properties. Thus her half interest is liable for her debts and torts.

> *Meyer v. Thomas* (1940) 37 Cal. App. (2d) 720.

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*The effect of an understanding that the property is actually community property despite the fact that the record title is in joint tenancy is not considered in this Brief, as no such situation is involved in the *Sullivan* case.

And, conversely, the wife's half cannot be levied upon under an execution on a judgment against the husband alone, although the effect of such a levy may be to subject the husband's half interest to the judgment, thus severing the joint tenancy and making the purchaser on execution a tenant in common with the wife.

> *Pepin v. Stricklin* (1931) 114 Cal. App. 32;
> *Young v. Hessler* (1945) 72 Cal. App. (2d) 67;
> *Hilborn v. Soale* (1919) 44 Cal. App. 115, 117;
> *Gwinn v. Commissioner* (1932) 287 U.S. 224, 228.

A further demonstration of the wife's half ownership of the capital or principal of joint tenancy property is to be found in her right to sever the joint tenancy property. Either joint tenant can do this by conveying his or her half interest to a third party without the consent or knowledge of the other joint tenant and the grantee becomes a tenant in common with such other original joint tenant.

> *Delanoy v. Delanoy* (1932) 216 Cal. 23;
> *Hiltbrand v. Hiltbrand* (1936) 13 Cal. App. (2d) 330;
> *Reiss v. Reiss* (1941) 45 Cal. App. (2d) 740;
> *Gwin v. Camp* (1938) 25 Cal. App. (2d) 10;
> *Gwinn v. Commissioner* (1932), 287 U.S. 224, 228;
> *Co-Tenancy,* 7 Cal. Jur., Section 7, p. 338.

See, also,

> *Co-Tenancy,* 14 Am. Jur., Section 14, p. 86.

The proceeds of any such sale by one joint tenant of his or her interest would, of course, be separate property of the seller under the cases first above cited making each half interest in joint tenancy property separate property rather than community property.

The wife's rights of severance, moreover, do not require that she sell the property. She has various means of obtaining her half interest in kind, destroying the joint tenancy character of

such half interest and converting it either into an undivided half interest as tenant in common or a physical half of the property. For example, the case of *Reiss v. Reiss,* above, holds that a transfer of a joint tenant's half interest to a trustee severs the joint tenancy (because it ends the fictional "unity of title" necessary to a joint tenancy). This means that the wife could transfer her half interest to a trustee for her sole benefit and still remain the equitable owner of the half interest but would thereby destroy the joint tenancy character and the husband's possibility of survivorship in her half. It is common practice, also, for her to sever the joint tenancy by conveying to a third party who then promptly re-conveys to her, with the result that she becomes tenant in common with her husband. She can also accomplish a physical division of the property by a partition suit in court.

> *California Code of Civil Procedure,* Section 752;
> *Dando v. Dando* (1940) 37 Cal. App. (2d) 371;
> *Partition,* 20 Cal. Jur., Section 28, p. 614 and Section 66, pp. 653-4.

It should also be noted that if the husband sells his half or does an act of severance, this automatically confirms the wife's sole ownership of her half free of any interest of the husband or his purchaser, and she and the purchaser thereafter hold as tenants in common.

> *Delanoy v. Delanoy* (1932) 216 Cal. 23;
> *Gwin v. Camp* (1938) 25 Cal. App. (2d) 10;
> *Tilden v. Tilden* (1927) 81 Cal. App. 535.

In view of these rights of each joint tenant, including the wife, the law requires little formality in a voluntary partition of joint tenancy property, and particularly where this consists of a division of it into two undivided interests held as tenants in common, which can be done merely by appropriate agreement or deed evidencing the intent of husband and wife to accomplish such result.

> *McDonald v. Morley* (1940) 15 Cal.(2d) 409;

Gould v. Kemp (1834) 2 My. & K. 302; 39 Eng. Rep. 959;

Co-Tenancy, 14 Am. Jur., Section 14, pp. 86-87 and notes.

Such was the agreement in this case.

This brings us to the only difference between joint tenancies and tenancies in common, namely: that in case of the death of one co-tenant, the surviving tenant in a tenancy in common does not take the half interest of the decedent (unless by the will of the decedent or by inheritance), but only retains his prior half interest; while the surviving tenant in a joint tenancy not only retains his prior half interest, but becomes by virtue of the death the sole owner of the entire property under California law. However, this is not because the death constitutes a transfer of legal title to the survivor. Such title is deemed to have vested when the joint tenancy was created and the death is treated as merely relieving the survivor from the further possession, enjoyment and "interference" of the deceased joint tenant.* This is clearly expressed and prior cases to the same effect are discussed in

Estate of Gurnsey (1918) 177 Cal. 211, especially at pp. 215-217,

which was followed and approved by this Court in

Carter v. English (C.C.A. 9, 1926) 15 F.(2d) 6.

It is also to be noted that while the husband during his lifetime does have, as incidents of his joint ownership, a share in possession and a possibility of survivorship, both affecting the wife's half interest as well as his own, she has the same incidents with respect to his half as well as her own, and each of

*The federal income tax cases recognize and apply this theory of the law, so that the income tax basis to a surviving joint tenant or tenant by the entirety is the original cost to the tenants, not the value at death.

Lang v. Commissioner (1933) 289 U.S. 109;

Carpenter (1932) 27 B.T.A. 282.

them can at any moment terminate the other's possibility of survivorship with respect to his or her own half by severance through one of the legal means already discussed, and also each tenant has legal means of terminating the other's share of possession in his or her own half, by a partition suit, for example.

B. THE FEDERAL GIFT TAX ATTACHES ON THE CREATION OF A JOINT TENANCY, AND THE INCOME THEREFROM IS TAXED EQUALLY TO THE TENANTS.

The substantive rights of the wife in joint tenancy property, above analyzed, are fully recognized for Federal tax purposes as long as both spouses remain living. In the first place, the wife is treated as having a vested half interest in the current income for income tax purposes and this is so clear that no litigation appears to have arisen on the question. The Internal Revenue Bureau has so ruled in

I. T. 3754 (1945) 1945 Cum. Bul. 143; and
I. T. 3825 (1946) 1946-2 Cum. Bul. 51,

and such rulings have never been questioned, the universal practice of the Commissioner being to tax the wife on half the income from such properties.

Furthermore, in the case of the Federal gift tax—which is intended to be *in pari materia* with the estate tax—the Commissioner of Internal Revenue has prescribed by regulation that it is the creation of the joint tenancy which constitutes a gift to the wife of her half interest when the property, as in this case, has previously been separate property of the husband. We refer to

Regulations 108, Section 86.2, subdivision (a), example (5),

which reads as follows:

"(5) If A with his own funds purchases property and has the title thereto conveyed to himself and B as joint owners, with rights of survivorship (other than a joint

> ownership described in example (4)* of this section), but which rights may be defeated by either party severing his interest, there is a gift to B in the amount of one-half the value of such property."

This regulation necessarily means that no gift of the wife's half interest occurs subsequently, when the wife severs and takes her half or when she obtains it by voluntary partition, because obviously there could not be two successive taxable gifts from the husband to her of her same half interest.

Even for estate tax purposes, the wife's right of severance or partition of joint tenancy property, whereby her half may be converted into property held as tenant in common, is recognized by cases holding that only one-half of the property held by husband and wife as tenants in common at the death of the husband is to be included in his estate notwithstanding the fact that the property may have been derived from joint tenancy property (or property held as tenants by the entirety) which would have been fully taxable if held until death.

> *Dennis* (1932) 26 B.T.A. 1120;
> *Estate of Irwin A. Smith* (1941) 45 B.T.A. 59.

To sum up this part of our brief, we believe that we have demonstrated that under California law the wife had a vested half interest in the properties in question before the transactions under discussion and that the effect of the partition transaction was not to vest this half interest in her, because that had already been done, but was only to sever her half and free it from the potentiality of survivorship of the husband and from his share in possession of the few securities divided in kind, although there was no change in the mutual sharing of possession as to the majority of the properties, which were converted into tenancy in common. We have also shown that

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*Example (4) covers a joint bank account "where A can regain the entire fund without B's consent," not a true joint tenancy and not here involved.

these substantive rights of the wife and this effect of the transaction are generally recognized for Federal tax purposes. Therefore, we go on to a consideration of whether the express provisions of the estate tax statutes require that the wife's rights be disregarded.

II. If There Be a Transfer of an Interest in Property When Joint Tenancy Properties Are Commuted into Tenancies in Common or Partitioned Between the Owners, the Transaction Nevertheless Involves a Bona Fide Sale, with Adequate and Full Consideration on Both Sides, Within the Provisions of Section 811(c) and Is Therefore Excluded from Its Operation.

If, as we shall show under the next headings, the transaction between Mr. and Mrs. Sullivan, in so far as it related to the joint tenancy property, did not involve a "transfer" of any "interest" in property, obviously we are not concerned with the question whether there was a bona fide sale for an adequate and full consideration. It is plain, however, that if there were a transfer, it was upon a full and adequate consideration and for that reason is excluded from the operation of Section 811(c). We discuss here this phase of the case.

Assuming for the purposes of argument that there was a transfer of an interest in property, the question then is whether the transaction is excluded from the operation of Section 811(c) as "a bona fide sale for an adequate and full consideration in money or money's worth." In determining this question it is of critical importance that we have a clear picture in mind of exactly what the transaction was.

As stated at the outset we are here concerned only with the property which, prior to the contract between Mr. and Mrs. Sullivan of November 24, 1943, was held in joint tenancy by them. As to such property they were co-owners, each owning an undivided one-half of the property as his or her separate property. The rights of each—whether as to ownership, pos-

session, use, or otherwise—were identical. One of the incidents of that particular form of co-tenancy was the right of survivorship. With the minor exceptions explained above, all that they did by their contract, which changed their co-ownership from a joint tenancy to a tenancy in common, was to terminate this incident of survivorship. Each still continued to own an equal undivided one-half of the property as his or her separate property. The rights of each—whether as to ownership, possession, use, or otherwise—continued to be identical. The one and only thing they did was to put an end to the right of survivorship—and even this was done equally and what each gave up was identical with what the other gave up.

As to most of the property this was not only what the parties did, but it was *all** that they did. The deeds and other instruments executed by them were merely for the purpose of establishing, as the contract itself provided (R. 9), the results of the agreement of record. We do not believe that the result is any different as to the four securities that were divided in kind.

It is this transaction that the Tax Court has said was a transfer of property by the decedent and yet was not "a bona fide sale for an adequate and full consideration in money or money's worth." If, as we shall show was the fact, the transaction was not a transfer at all, obviously it was not a sale. But if a transfer can be worked out under the facts in order to support the tax under Section 811(c)—and under this heading of our brief we are proceeding, for the purposes of argument, as though it could be—we respectfully submit that such transfer is squarely within the clause of Section 811(c) excluding from its operation a sale for a full and adequate consideration.

Where, as here, what one of the parties gave or transferred to the other was not only equal to, but also identical with, that which the other gave or transferred in return, it would seem axiomatic that the sale was for a consideration that was neces-

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*All emphasis throughout this brief, both in text and in quotations, is ours unless otherwise expressly noted.

sarily full and adequate, so as to remove the question from the realm of reasonable debate. What, then, is the Tax Court's argument to the contrary? The Tax Court attempts to make three points, which we take up separately and in order.

A. A BONA FIDE SALE UNDER SECTION 811(c) DOES NOT REQUIRE ARM'S LENGTH BARGAINING OR OTHER ELEMENTS SUGGESTED BY THE TAX COURT.

The first argument advanced by the Tax Court is—

> "We do not, in the first place, find here the characteristics of a bona fide sale in the transaction. The transfers, as already pointed out, had their inception in a desire, obviously mutual, to lessen death duties while contemplating death. No bargaining at arms' length, or otherwise, appears. The petitioner concedes that the interest of the survivor was acquired by her in the first instance by a gift from the decedent. Neither does it appear that either party gave any thought to whether he or she was receiving value, adequate or inadequate, for property interests transferred. The nature of the transaction and its purpose was one that did not contemplate anything more than reciprocal transfers without regard to consideration of any kind. It was simply a family arrangement for the protection of their estates, as they regarded them." (R. 107)

The argument here is without substance in every particular, as we now propose to show. It is first said that "The transfers, as already pointed out, had their inception in a desire, obviously mutual, to lessen death duties while contemplating death." This fact, assuming it to be the fact, may justify the Tax Court's conclusion that the transaction was in contemplation of death, but it certainly has no bearing whatever on the question whether the transaction was a bona fide sale. The mere fact, if it be the fact, that the transaction was in contemplation of death does not, either as a matter of law or as a matter of fact, indicate that the transaction was not bona fide or that it was not a sale. A simple illustration suffices. Suppose a man on his deathbed

realizes that his property is primarily real property and when death comes he will not have sufficient liquid assets to pay taxes, for which reason and in contemplation of death he sells some of his property at fair market value for cash. The transaction is in contemplation of death and has for its purpose taking care of death taxes, but no one would even suggest that it is not a bona fide sale.

It is next said that "No bargaining at arms' length, or otherwise, appears." When, may we ask, has it been essential to a bona fide sale that there be any bargaining? I buy my morning's paper from a newsboy, but we do not bargain "at arms' length, or otherwise" about it,—and yet no one would deny that a bona fide sale takes place. So, too, when I go into a drug store and buy a tube of shaving cream. So, too, of a thousand and one purchases made every day in almost every store in the land. Indeed, in the ordinary transactions of life for everyone of us a sale that involves bargaining "at arms' length, or otherwise," is the exception and not the rule. And where, as in this case, it is perfectly obvious to anyone that each party is giving and receiving equal value, what need is there for bargaining procedures?

It is next said "The petitioner concedes that the interest of the survivor was acquired by her in the first instance by a gift from the decedent." What possible bearing, it may be asked, can this have on the question whether the subsequent transaction was a bona fide sale? Suppose, for example, Mr. Sullivan had given her some cash twenty years ago and she now uses this to buy property from him. Obviously, the transaction would be a bona fide sale notwithstanding the original gift. How Mrs. Sullivan acquired her original interest in the property is an entirely false quantity in determining the character of the subsequent commutation of the co-ownership from joint tenancy to tenancy in common.

It is next said

> "Neither does it appear that either party gave any thought to whether he or she was receiving value, adequate or in-

> adequate, for the property transferred. The nature of the transaction and its purpose was one that did not contemplate anything more than reciprocal transfers without regard to consideration of any kind."

To this there are two answers. The quoted statements gratuitously assume, without any support whatever in the record, that the parties did not understand what they were doing. If they understood the transaction at all, each of them inevitably must have known that what he or she was "transferring" was not only equal to, but identical with, that which he or she was receiving. But more than this—so far as consideration is concerned it made not a particle of difference what the parties may have known or thought. The matter of controlling importance is not what they thought or knew about the consideration, but whether in point of actual fact the consideration was full and adequate. If it was—and it necessarily had to be when what passed to each from the other was identical—it would have made no difference had the parties supposed or thought otherwise. The statute is not concerned with the parties' views of adequacy, but solely with adequacy in fact, which manifestly existed here.

And finally it is said "It was simply a family arrangement for the protection of their estates, as they regarded them." This remark is, at best, but a foggy one, but so far as it means anything it in no wise supports the position of the Tax Court. Many a sale is made by persons "for the protection of their estates" and that purpose certainly does not prevent the transaction from being a sale. If it is meant to be suggested that the transaction was not "bona fide"—i.e., that it was a sham and not real,—there is neither finding nor record evidence in support. Everything shows that the contract of November 24, 1943 was made and carried out in good faith.

B. THE WORDS "BONA FIDE SALE," AS USED IN SECTION 811(c), INCLUDE TRANSACTIONS THAT MAY BE REGARDED AS EXCHANGES, AS WELL AS SALES FOR MONEY.

The second point made by the Tax Court is stated thus:

> "Moreover, the division of the joint property into interests in common was not sale, in the ordinary sense in which we think the statute used the term. The word 'sell' —in its ordinary sense means a transfer of property for a fixed price in money or its equivalent. United States v. Benedict, 280 Fed. 76, 80, quoted in Hale v. Helvering, 85 Fed.(2d) 819. No price was fixed here. It will be noted that section 811(c) does not include 'exchange'; and the most that could be said of the division of the joint estates would be that it was in a sense exchange."

The essence of the point thus attempted to be made is that the "transfer" between Mr. and Mrs. Sullivan was an "exchange," which is not included in the phrase "a bona fide sale" used in 811(c). The answer is the simple and direct one that such is not the law.

Apparently, the Tax Court is here proceeding upon the assumption that in order to have a "sale" the price must be "fixed"—i.e., stated—in money or in terms of money. This is much too narrow a view of the term "sale" as used in the context of Section 811(c).

First, the position taken by the Tax Court that there must be a "fixed price" flatly ignores the language of the statute itself. The sales referred to in Section 811(c) are those for a consideration "in money or *money's worth.*" Obviously, the words "money's worth" indicate that the word "sale" includes transfers where the consideration is something other than money—i.e., property having a money value—and this is exactly what an "exchange" is. There is nothing in the statute that says that the "money's worth" must be fixed or stated. Moreover, the Tax Court's argument ignores Section 811(i), which provides:

> "(i) Transfers for Insufficient Consideration.—If any one of the transfers, trusts, interests, rights, or powers, enumerated and described in subsections (c), (d), and (f) is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the *value* of the consideration received therefor by the decedent."

This language shows unmistakably that the consideration constituting "money's worth" may be property other than money itself, which is precisely the case at bar if it be assumed that there was a transfer by the decedent. It is to be noted that the statute speaks of the "value" of the consideration, rather than the "amount," which necessarily contemplates that the consideration may be property instead of money.

Second, the question of what constitutes "a bona fide sale," not taxable as a transfer in contemplation of death, arose years ago in connection with the relinquishment of a wife's inchoate right of dower or her interest in the estate of her husband and the law was clearly laid down contrary to the Tax Court's present holding. In

> *Ferguson v. Dickson* (C.C.A. 3, 1924) 300 Fed. 961, cert. den. 266 U.S. 628,

the decedent transferred certain securities in trust for the benefit of his intended wife, with the income payable to himself so long as he lived, in consideration of which she relinquished her inchoate right of dower. The Commissioner contended, just as he has here, that the transfer was in contemplation of death and was not "a bona fide sale" within the meaning of Section 402(c) of the Revenue Act of 1918, the predecessor of 811(c). The Court of Appeals for the Third Circuit went right down the line against the Commissioner, saying (p. 963):

"Many courts have defined a legal sale:

"It is 'a transmutation of property from one man to another in consideration of some price.' 2 Blackstone, 446; Dunn v. Mayo Mills, 134 Fed. 804, 810, 67 C.C.A. 450. 'A sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent.' Five Per Cent. Cases, 110 U.S. 471, 478, 4 Sup. Ct. 210, 214 (28 L.Ed. 198). 'A sale is a contract by which, for a consideration, one transfers to another property or an interest therein.' Yick Sung v. Herman, 2 Cal. App. 633, 83 Pac. 1089, 1091. 'A sale is a contract whereby one acquires a property in the thing sold and the other parts with it for a valuable consideration.' Cole v. Laird, 121 Iowa, 146, 96 N.W. 744. 'Every transfer of property for an equivalent is practically and essentially a sale, and * * * money's worth is a valuable consideration [for the sale] as much as money itself.' Huff v. Hall, 56 Mich. 456, 23 N.W. 88.

"The intended husband transferred to the trust company, for the benefit of the intended wife, the property out of which she was to receive a certain interest. The exact amount which she would receive was dependent upon the happening of some one of the various contingencies set out in the contract. In return for this new property right, she absolutely extinguished her inchoate right of dower in everything that he then had or might thereafter acquire.

"We think that this transaction constituted a sale. The husband absolutely sold his right in the securities as defined and limited in the contract and the intended wife purchased them with the property constituting her inchoate right of dower. Her dower rights in all his property and his rights in the securities within certain limits, which would inevitably become definite, were gone forever."

The court further held that the sale was for a fair consideration in money or money's worth and that therefore the transaction was not taxable under Section 402(c) as a transfer in contemplation of death.

The same result was reached in

McCaughn v. Carver (C.C.A. 3, 1927) 19 F.(2d) 126.

It is true that these decisions were *legislatively* reversed on the second ground by later amendments to the revenue laws. The significant point is that they were reversed, not by providing that the transactions involved were not bona fide sales, but by changing the definition of the required consideration and by providing expressly (now in Section 812(b)) that a relinquishment or promised relinquishment of dower, curtesy or other marital rights in the decedent's property or estate shall not be considered to any extent a consideration in money or money's worth. The cases show that a transfer of property interests in consideration of a relinquishment or transfer of property rights constitutes "a bona fide sale" within the meaning of the statute. And it hardly need be added that here, in the *Sullivan* case, we are not dealing with dower, curtesy or other marital rights.

Nor do the cases cited by the Tax Court indicate a contrary result. In

> *United States v. Benedict* (C.C.A. 2, 1922) 280 Fed. 76, aff'd (1923) 261 U.S. 294,

one of the questions was whether the power given to a trustee "to sell" included the power to convey to the City of New York for street purposes in consideration of exemption of the remaining land from assessment. While it is true that the court there said that the word "sale" "in its ordinary sense means a transfer of property for a fixed price in money or its equivalent," the significant fact is that the court went on to hold that in the context the word "sell" had a much broader meaning and included the conveyance made by the trustee, which was solely in consideration of an exemption of the remaining lands from assessment. In the other case cited by the Tax Court,

> *Hale v. Helvering* (App. D.C. 1938) 85 F.(2d) 819,

the question was whether a settlement with the maker of certain promissory notes for less than face was a "sale" or "exchange" of a capital asset, giving rise to a capital loss deduction, and the court held that it was neither. While, as the Tax Court

points out, the Court of Appeals quoted the above language from the *Benedict* case, it is worthy of note that it also quoted the following from *Black's Law Dictionary,* which is entirely pertinent here:

> "The distinction between a sale and exchange of property is rather one of shadow than of substance. In both cases the title to property is absolutely transferred; and the same rules of law are applicable to the transaction, whether the consideration of the contract is money or by way of barter. It can make no essential difference in the rights and obligations of parties that goods and merchandise are transferred and paid for by other goods and merchandise instead of by money which is but the representative of value of property."

In view of the decisions above dealing with the exact question of the meaning of the word "sale" as used in connection with transfers in contemplation of death, it would hardly seem necessary to go afield for cognate decisions, but the cases, including the tax cases, are many that hold that the word "sale" includes transfers that might equally be regarded as exchanges.*

An example should suffice to complete the demonstration of this point. On his deathbed and in contemplation of death a businessman transfers his business, which has a fair market value of $200,000 but which requires constant management, to his brother in exchange for $200,000 of marketable securities belonging to his brother, who has acquired the securities from his own earnings. Is the decedent's estate to be taxed on both the $200,000 of securities received on this exchange and still held at his death, and also on the $200,000 value of the business transferred to the brother in consideration for the securities, because this exchange is not a "sale" under Section 811(c)? Obviously Congress intended no such doubling of the estate tax but considered this type of transaction to be a "sale."

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*As illustrative, see

Helvering v. Syndicate Varieties (App. D.C. 1944) 140 F.(2d) 344;

Gruver v. Commissioner (C.C.A. 4, 1944) 142 F.(2d) 363.

It is submitted that the transaction here, if a transfer at all, was "a bona fide sale" within the meaning of those words as used in Section 811(c).

C. THE REQUIREMENT IN SECTION 811(c) OF "AN ADEQUATE AND FULL CONSIDERATION IN MONEY OR MONEY'S WORTH" IS MET WHERE THE CONSIDERATION MOVING IN EACH DIRECTION IS IDENTICAL. SUCH CONSIDERATION IS NOT INADEQUATE BECAUSE, FOR OTHER REASONS, THE TRANSACTION RESULTS IN A SAVING OF ESTATE TAX.

The final point made by the Tax Court is this:

> "* * * Nor was the transaction for the necessary consideration. Assuming that the division of interests had such reciprocity as to constitute a good consideration between the parties, we think it was not the adequate and full consideration in money or money's worth intended by the statute. A sale for full adequate consideration in money or its worth would not diminish the estate of the transferor, but leave it in effect the same as before, therefore, such a sale would be unobjectionable to the estate tax law.
>
> * * *
>
> "* * * Here it seems clear that for estate tax purposes the decedent's estate was diminished for he surrendered for the purposes of estate tax law more than he received, because, as the parties have stipulated that in the absence of the transfer here involved, the entire joint estate would be taxable under the provisions of section 811(e), whereas, under the transfer or agreement made he received only a half interest, by tenancy in common, and therefore only that amount would be taxable estate." (R. 108, 109)

The concept of the Tax Court here is that though the consideration passing in each direction is not only equal, but absolutely identical, it is yet not full and adequate because the result is a tax saving.* It must be obvious that the Tax Court

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*It is, perhaps, worthy of note that if there was any exchange here at all the decedent did not transfer property owned by him outright in exchange for the wife's relinquishment of an expectancy. What actually took place was that each extinguished his or her expectancy of taking the share of the other by survivorship.

has confused adequacy of consideration with taxability. There is no warrant for the conclusion thus reached.

It is to be noted that the Tax Court does *not* say—nor could it possibly say—that, treating the transaction as a transfer, what passed to the decedent, Mr. Sullivan, was not fully equal to that which passed from him to Mrs. Sullivan. Inasmuch as the interests that passed in each direction, if any did pass, were absolutely identical, obviously there could be no finding of inequality and such a finding, if made, would be without support either in law or in fact.

The position of the Tax Court is, therefore, that although the consideration moving to the transferor is equal to and identical with that which he transfers, under Section 811(c) the consideration is still inadequate if the result would be a tax saving. In other words, though decedent's *actual* estate is in no respect reduced, if the *taxable* estate is reduced then the consideration is inadequate. It is demonstrable that this is not so and it is equally demonstrable that the difference in tax result is due, not to any inadequacy of the consideration for the property transferred, but to the fact that Congress has seen fit to tax joint tenancies differently from tenancies in common and the Tax Court has completely overlooked this fact. We proceed to that demonstration.

Let us suppose that A is on his deathbed and knows that he has but a short time to live. He realizes that he must put his house in order. His entire estate consists of real property which he holds in joint tenancy with his wife, the entire property being worth $200,000. In contemplation of death and with the sole motive of providing his estate with liquid assets when he dies, he sells his undivided half interest in the realty to a real estate dealer for $100,000 in cash. He then dies. We apprehend that neither the Commissioner nor the Tax Court would have the fortitude to contend that because the taxable estate is, by this action, reduced from $200,000 to $100,000, therefore the consideration was inadequate, nor would we be

apprehensive of the position this Court would take if any such contention were made. The reason the taxable estate has been cut in half is, not that the consideration was inadequate (because *ex hypothesi* the full value of decedent's interest was paid for in money), but because Congress has seen fit to tax joint tenancies differently from tenancies in common and, by selling his interest for cash, A ceased to hold any property in joint tenancy. This he was free to do, if it suited his purpose.

Indeed, the result would be exactly the same had A's motive for selling been, not to obtain liquid funds for his estate when he should die, but to avoid the tax results of holding property in joint tenancy.*

One further example should demonstrate the fallacy of the Tax Court's reasoning. Suppose H and W held as joint tenants Blackacre, having a fair market value of $100,000, the consideration for the acquisition of which was derived entirely from H's separate property, and, in addition, H held in his own name Whiteacre, having a fair market value of $50,000, which was his own separate property. In contemplation of death, H transfers to W Whiteacre in exchange for her interest in Blackacre. If the Tax Court be right in its decision in this case, it would have to hold that this exchange was not for a "full and adequate consideration," even though the joint tenancy had been created many years before and not in contemplation of death, and even though the fair market value of the *severable* half interest of W

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*"It has been held from an early date that a taxpayer has the legal right to decrease the amount of what otherwise would be his taxes or altogether avoid them by means which the law permits. United States v. Isham, 17 Wall. 496, 506, 21 L.Ed. 728. The principle was reaffirmed in Gregory v. Helvering, 293 U.S. 465, 469, 55 S.Ct. 266, 79 L.Ed. 596, 97 A.L.R. 1355, was recently restated in Commissioner v. Tower, 327 U.S. 280, 66 S.Ct. 532, 90 L.Ed. 670, 164 A.L.R. 1135, and has been applied in numerous Circuit Court of Appeals cases. As was said by this court speaking through Judge Hickenlooper in Marshall v. Commissioner, 57 F.2d 633, 634: 'There was nothing unlawful, or even mildly unethical, in the motive of petitioner, to avoid some portion of the burden of taxation.' "

United States v. Cummins Distilleries Corporation (C.C.A. 6, 1948) 166 F.(2d) 17, at 20.

in the joint tenancy property was fully equal to the fair market value of Whiteacre. The Tax Court in the hypothetical case given would have to say that W's severable one-half interest in Blackacre was not "full and adequate consideration" because it would have been included in H's estate but for the indicated transaction. It is impossible, we submit, either in the hypothetical case or in the instant case to conjure out of the plain words "full and adequate consideration" any such strained, unnatural and fanciful meaning.

Nor do the cases cited by the Tax Court, when considered in the light of their facts, hold otherwise. The first case cited is

Latty v. Commissioner (C.C.A. 6, 1933) 62 F.(2d) 952.

There the decedent made an agreement with his daughter that in consideration of her agreeing to make no claims against him during his life or against his estate after death for support, maintenance or distribution he would create a $50,000 trust for her, either inter vivos or upon his death, in the meantime paying her 5% interest on that sum. The decedent not having set up the trust before death or provided for it in his will, his executrix paid the daughter $53,381.55 in satisfaction of the obligation and sought to take this amount as a deduction under a contract made for fair consideration in money or money's worth. The court held that, assuming the agreement to have been binding,

> "* * * it was in fact and in substance an agreement upon the father's part *to make a bequest for the use of his daughter,* and that as such it was a claim to a distributive interest in the estate and not a claim against the estate within the meaning of Section 303."

It is true, as the Tax Court points out, that the court further held that for a contract claim to have been incurred for a fair consideration in money or money's worth so as to be deductible it should appear that the consideration either augmented the estate of the decedent or granted the decedent some right or privilege he did not possess before or operated to discharge a

then existing claim. The reason is, of course, clear. The tax saving in the *Latty* case, had there been one, would have arisen, not because the decedent, having a choice between two alternative courses, chose the one producing the lesser tax, but only because the consideration for his contract promise was inadequate—i.e., was of a value less than the amount the decedent promised to transfer in trust. Accordingly, it was appropriate for the court to say that the consideration there, to be adequate, must augment the estate. This does not mean, nor is there anything in the opinion that even suggests, that where, as in the *Sullivan* case, the consideration was not only adequate but identical with that which the decedent transferred, it is yet to be said to be inadequate because the transaction, for entirely different reasons (i.e., the difference in method of taxing joint tenancies and tenancies in common), resulted in a tax saving.

The case next cited by the Tax Court,

> *Commissioner v. Porter* (C.C.A. 2, 1937) 92 F.(2d) 426,

is even less in point. In that case the decedent guaranteed certain loans which a bank made to his son-in-law. At one time the collateral deposited with the bank by the son-in-law was adequate, but it later became inadequate. After decedent's death the bank foreclosed the collateral, and this being insufficient, the bank called upon the decedent's executors to make good the guarantee, by reason of which they paid the bank $75,000, the amount of the guarantee. Efforts to collect from the son-in-law proved unavailing. The executors claimed a deduction of $75,000, which the Commissioner disallowed on the ground that the contract of guarantee was not supported by full and adequate consideration. The Board of Tax Appeals held that the statute did not require that the consideration should move to the decedent; that it was in fact adequate; and that the amount paid was deductible; and the Court of Appeals affirmed. It is true that the court said, as the Tax Court points out, that the purpose of the requirement of a full and adequate consideration is "to prevent a man from diminishing his taxable estate by

creating obligations not meant correspondingly to increase it, but *intended as gifts or a means of distributing it after his death,"* but obviously this language has no application whatever to the facts of the *Sullivan* case. The court went on to point out that, at the time of the guarantee, the decedent received as consideration in return a subrogation right against the son-in-law who was not shown to be insolvent, and the mere fact that this right later became valueless did not defeat the deduction. When analyzed, the case supports, not the Tax Court, but our position that where the tax saving results, not from the inadequacy of the consideration, but from other factors the saving is not to be denied by a thinly guised claim that the consideration was inadequate.

The case of

> *Helvering v. Robinette* (C.C.A. 3, 1942) 129 F.(2d) 832, aff'd 318 U.S. 184,

on the Tax Court's own statement of it, is not even remotely in point. The Tax Court says that the case shows that, for gift tax purposes, "an exchange of promises *relative to testamentary dispositions* is held not to be adequate and full consideration in money or money's worth." Obviously, mutual promises by a mother and daughter to make gifts to others, even if deemed supported by common law consideration, do not change the transaction into one other than that of making gifts which are subject to the gift tax. But we do not have any such facts, or any comparable facts, in the *Sullivan* case. The *Robinette* case does not even suggest, much less hold, that where identical property interests move in each direction on a transfer there is any room for the Commissioner to contend that the consideration is yet inadequate.

Nor can a comparable situation be found in the final case cited by the tax court on this point—

> *Phillips v. Gnichtel* (C.C.A. 3, 1928) 27 F.(2d) 662, cert. den. 278 U.S. 636.

There a husband and wife, each owning property of large value, formed a family corporation and transferred the property to it, the husband taking 51% and the wife 49% of its stock. The husband was about to die and his doctor had so advised him. Pursuant to a mutual understanding the husband and wife created reciprocal trusts, the income from the wife's trust being payable to the husband for life and the income from his trust being payable to her for life, with remainders over to their children. Confessedly this was done in contemplation of death and two months later the husband died. The court held, and apparently very properly, that the transaction was in no sense an even business exchange or sale, but was very obviously an arrangement in the nature and having the effect of a testamentary disposition that was taxable as a transfer in contemplation of death. Manifestly, unlike the *Sullivan* case, what the decedent received was (in view of his very short life expectancy) in no respect equal in value to the property he transferred in trust.

We forebear pressing the argument further. It is one thing for the courts to use language about diminishing the taxable estate where, under the facts, that comes about because the consideration received by the decedent was inadequate (i.e., was of a value less than that which he gave), but it is an entirely different thing for the Tax Court, as it has done in this case, to wrest such language from its context and attempt to apply it to a case where the tax saving is due, not to any inadequacy or non-equivalence of consideration, but to the fact that the taxpayer has chosen a form of property ownership which Congress has taxed less severely than the form of ownership in which the property was previously held. What the Tax Court is doing in practical effect, though not in form, is denying the taxpayer the choice which Congress has deliberately left open to him. It should not be necessary to advert to the fact that the Tax Court has not been vested with legislative powers and, until it is, it must be content with the law as laid down by Congress.

III. The Wife's Half of the Joint Tenancy Property Involved in Commuting the Property into Tenancies in Common or Partitioning It Between the Owners Is Not Includible in Decedent's Gross Estate Under Section 811(c) Because Section 811(c) Requires That the Property Sought to Be Included in the Gross Estate Must Have Been Transferred by the Decedent and the Commutation or Partition Is Not a "Transfer" by the Decedent of the Wife's Half Interest in the Joint Tenancy Property.

In this case the Tax Court held that Section 811(c) applied to the wife's half of the joint tenancy properties taken by her in the partition.* Therefore, the Court necessarily held that all of such half was an "interest" of which *decedent* made a "transfer" in contemplation of death, because Section 811(c) requires the inclusion of property in the gross estate only "to the extent of any interest therein of which the decedent has at any time made a transfer * * * in contemplation of * * * death." Strangely enough, however, there is no discussion in the Tax Court's opinion of whether or not a transfer was involved or, if so, what the extent of the interest transferred actually was. The Court seems to have simply taken it for granted that these requirements of Section 811(c) were present, and then, on this assumption to have concluded that it could ignore the partition and treat the property as still held in joint tenancy at decedent's death, thus including all of it in his taxable estate under Section 811(e)(1) (see 10 T.C. at 973, R. 112).

In the first place, there can be no doubt that a transfer is essential under Section 811(c). It is only when there is a transfer that the language of the section can apply; and the authorities recognize the necessity of a transfer. Thus it is said in

1 *Paul, Federal Estate and Gift Taxation,* Section 6.04:

"It is also implicit in the statute that the decedent must

*By "partition" we mean, as already indicated above, the transmutation of most of the properties into tenancy in common by the agreement of November 24, 1943, between decedent and his wife.

have made a transfer. And a transfer must have been of property owned by the decedent."

The following statement is also made in

Montgomery's Federal Taxes—Estates, Trusts and Gifts, 1947-48, page 437:

"* * * Obviously the decedent must have transferred property during his life in order for the statute to be invoked."

And cases involving transactions which are found not to be transfers hold that such transactions are not reached by Section 811(c), although they may have the effect of freeing property from rights of the acting party. Thus in

Brown v. Routzahn (C.C.A. 6, 1933) 63 F.(2d) 914; cert. den. 290 U.S. 641,

a surviving husband's renunciation of a one-third interest in his wife's estate, which she had bequeathed to him by her will, was sought to be taxed under a forerunner of Section 811(c) containing the same wording in all important respects, but the Court held that the renunciation could not be so treated because the mere refusal of decedent to take under the will was not a transfer. Similarly, the exercise or release of a power of appointment created by a third person was held not to be a taxable transfer under the analogous wording of the gift tax law, Section 1000(a), which also required a "transfer."*

Clark (1942) 47 B.T.A. 865 (Acq. by Commissioner, 1942-2 Cum. Bul. 4);

Grasselli (1946) 7 T.C. 255 (Acq. by Commissioner, 1946-2 Cum. Bul. 2).

This brings us to the basic question here, namely, whether the wife's half of the properties (previously in joint tenancy)

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*After these cases arose, Section 1000(c) was added to provide specifically that the exercise or release of such a power was to be treated as a transfer for gift tax purposes, but they still have the same force in demonstrating the necessity of a true transfer, not some other act, when the statute requires a "transfer."

which came into her separate ownership by reason of the partition, was acquired by her by means of a "transfer" from her husband made at the time of and by means of the partition. Of course, there can be no doubt that when she obtained her original half interest in the joint tenancy properties, she did so by reason of a transfer from her husband, but this had occurred around 1922, and such transfer could not come under Section 811(c) because the Commissioner makes no claim that it was done in contemplation of death and because it occurred many years prior to the two-year period of presumptive contemplation of death. It is, therefore, only the partition on November 24, 1943 which must be considered.

Certainly no one would contend that there is a "transfer" by the husband when his wife obtains a severance or partition of joint tenancy property by sale of her half or by court proceedings or other legal means without any participation or consent by the husband. Is the situation any different, then, when she takes her half under a voluntary partition agreement followed by confirmatory deeds and assignments which merely recognize and quitclaim her pre-existing right to the division?* It seems obvious that there is no true transfer to the wife in such a partition. This is not only because she owns before the partition in substance exactly what she owns after the partition, but also because she continues to hold her half *by reason of her right to take it* and not by reason of her husband's participation in the partition.†

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*See footnote at page 4 supra.

†The United States Supreme Court has already recognized that "until the death of her co-tenant, the wife could have severed the joint tenancy and thus have escaped the application of the estate tax . . ." under Section 811(e) which taxes property held in joint tenancy at death. *U. S. v. Jacobs,* 306 U.S. 363, 371. Inasmuch as the wife joined in the severance herein, she did exactly what the Supreme Court said she might do to escape the tax. If she had acted alone, instead of in concert with her husband, surely no one would argue that she had made a "transfer." His action was not a prerequisite to the severance nor did it nullify her action, which, as the Supreme Court said, was an appropriate means of avoiding the tax.

A partition is not in ordinary parlance or in common sense a transfer of any substantial interest from one co-owner to another. It is rather a taking by each owner of what he previously owned or had the right to take. No one ordinarily thinks of it as involving any transfer, much less a gift. It is fundamentally a simple concept. A mother tells her twin children, "Boys, there is a piece of pie for you on the kitchen table," and the twins, having reached that civilized age at which they recognize each other's rights, proceed to cut the piece in half and each takes half. In such a case of partition, neither one of the twins nor the mother is aware or would believe that either boy has transferred anything to the other or has received anything from the other; on the contrary, they all consider that each twin has merely taken what belonged to him.

And this common understanding of the most simple partition is recognized by the authorities as equally true of legalistic partitions by court proceedings or voluntary action. As stated in

Partition, 20 Cal. Jur., Section 66, pp. 653-654,

> "At common law a judgment of partition making allotments operates to vest in each tenant a sole estate in his allotment, but nothing further is effected thereby than the affirmance or ascertainment of the possession. Although the effect of the judgment now is determined by the statute, it is settled in harmony with the common-law rule that the judgment has no other effect than to sever the unity of possession and community of interest, *and that it does not vest in either of the tenants any new or additional title, nor affect the character of their title in any other respect,* unless expressly so declared. *The judgment merely divides and apportions the pre-existing rights* and estates, transforming the right of common possession into a right to the exclusive possession of a proper interest or share in severality; and each party thereafter holds in severalty that interest which he previously held in undivided form, under the same title and subject to the same obligations, covenants and contracts as before. * * *
>
> "*A voluntary partition, effected by an interchange of deeds, produces the same result as a judgment in partition.*"

But on the present question, the most important authorities to the effect that no transfer is involved consist of a line of United States Supreme Court decisions which hold that the change in *the wife's half interest* in joint tenancy property and analogous co-ownerships which occurs when she becomes the sole owner of her previously vested half interest does not constitute a *transfer* to her of that half but rather is merely an *accession* to her of full possession and control and of freedom from interference of the other tenant and may thus support an excise tax expressly directed at such accession, but does not support a transfer tax. We refer to the decisions upholding the Federal estate tax expressly levied on properties held at the time of the husband's death in tenancy by the entirety, joint tenancy, and as community property, namely,

> *Tyler v. United States* (1930) 281 U.S. 497;
> *United States v. Jacobs* (1939) 306 U.S. 363;
> *Fernandez v. Wiener* (1945) 326 U.S. 340.

The difficult question in each of these cases was whether *the wife's half* of the property, freed to her by the husband's death, could be included in the husband's taxable estate. In the first two cases the statutory forerunner of Section 811(e)(1) was involved and the types of co-ownership were tenancy by the entirety in the *Tyler* case and true joint tenancy in the *Jacobs* decision. The *Fernandez* case tested the constitutionality of the comparable Section 811(e)(2), added by the 1942 Revenue Act, and the property was Louisiana community property. In each case the tax was held constitutional as applied to the wife's half interest.

In each of the three cases the Supreme Court was concerned with the tax on *the wife's half* of the property as either the sole or the primary question involved; and it was the tax on *her half* alone which caused real difficulty for the Court because of the obvious absence of any transfer as a basis for the tax. The husband's half was not involved in the *Jacobs* case, because both the District Court and the Circuit Court of Appeals had

included it in the gross estate and the taxpayer respondent did not appeal from this, but conceded that the husband's half was taxable under the forerunner of Section 811(e). Similarly, in the *Fernandez* case the husband's half was not involved because the Louisiana community property law made the husband's half pass upon his death, not to the wife, as such, but to his heirs or under his will as an ordinary transfer by operation of law. In the companion cases reported as *Tyler v. United States,* above, involving tenancies by the entirety, each taxpayer was questioning a tax on both the husband's half and the wife's half on the ground that under the common law fiction of unity of title, the whole title was vested in the wife at the inception of the ownership and therefore even the husband's half was not transferred to the wife on the husband's death. But if only the husband's half had been involved, it seems clear that the Supreme Court would not have had any difficulty in finding a true transfer. The Court was not bothered by the common law theory of unity of title, for after describing this "amiable fiction of the common law," the Court said at 281 U. S. 503:

> "* * * This view, when applied to a taxing act, seems quite unsubstantial. The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. * * *"

Obviously, the effect of the husband's death on each tenancy by the entirety involved in the *Tyler* case was to terminate the husband's real half ownership of the property. Indeed, as pointed out in the later discussion of the *Tyler* case and other early cases in the *Jacobs* opinion and footnotes at 306 U.S. 367-8, the Supreme Court had already held in *Gwinn v. Commissioner* (1932), 287 U.S. 224 and *Griswold v. Helvering* (1933) 290 U.S. 56, that a prior Federal estate tax statute which had been construed as not retroactive, so as not to tax transfers completed before its adoption, was, nevertheless, to be considered as properly taxing prospectively the husband's half —but not the wife's half—of joint tenancy property where the

property had been transferred into joint tenancy before the adoption of the statute, but the husband died after such adoption.* The basic reason for this was, of course, that in all substance the husband's half passed to his wife at his death rather than at the inception of the joint tenancy.

Thus it was the wife's half which caused the real difficulty for the Court in the *Tyler* case, and the only problem in the *Jacobs* and *Fernandez* cases. In the *Tyler* case it was undoubtedly because the wife's half was involved that the Court observed at 281 U.S. 502 that Section 201 (the forerunner of Section 810)

> "* * * imposes the tax 'upon the transfer of the net estate'; and if that section stood alone, the inclusion of such property in the gross estate of the decedent probably could not be justified by the terms of the statute. But §202 [the forerunner of Section 811(e)(1)] definitely includes the property and brings it within the reach of the words imposing the tax; so that a basis for the constitutional challenge is present."

And, similarly, in the *Jacobs* case, in which the husband's half was not involved at all, the Court said, quoting in part from the *Tyler* opinion (306 U.S. at pages 367-8):

> "* * * Congress has the power to levy a tax upon the occasion of a joint tenant's acquiring the status of survivor at the death of a co-tenant. In holding that the full value of an estate by the entirety may constitutionally be included in a decedent's gross estate for estate tax purposes, this Court said: 'The question * * * is, not whether there has been, in the strict sense of that word, a "transfer" of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit),

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*The *Gwinn* case was not a husband-and-wife joint tenancy, but the *Griswold* case was, and it involved the exact situation described in the sentence of the text to which this note refers.

to be measured, in whole or in part, by the value of such rights * * *.

" 'At * * * [the co-tenant's] death, however, and because of it, * * * [the survivor] for the first time, became entitled to exclusive possession, use and enjoyment; she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold and enjoy it absolutely as her own; and then, and then only, she acquired the power not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the "generating source" of important and definite *accessions* to the property rights of the other. These circumstances, together with the fact, the existence of which the statute requires, that no part of the property originally had belonged to the wife are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax.'[7]" (Citing in footnote 7 "*Tyler v. United States,* 281 U.S. 497, 503, 504.")

In the same opinion in the *Jacobs* case, the Court also said, in recognition of the wife's vested half interest (306 U.S. 371):

"* * * *Until the death of her co-tenant, the wife could have severed the joint tenancy and thus have escaped the application of the estate tax of which she complains.* Upon the death of her co-tenant she for the first time became possessed of the sole right to sell the entire property without risk of loss which might have resulted from partition or separate sale of her interest while decedent lived. There was—at his death—a distinct shifting of economic interest, a decided change for the survivor's benefit. This termination of a joint tenancy marked by a change in the nature of ownership of property was designated by Congress as an appropriate occasion for the imposition of a tax."

Finally, in the *Fernandez* case substantially the present Supreme Court made it clear that the wife's half of Louisiana community property was not to be taxed at the husband's death on any theory that it was then transferred to the wife. The

Court pointed out at 326 U.S. 355 that the death of the husband transferred *his half* by operation of the Louisiana law either to his heirs or under his will; but it immediately spoke of the effect of such death on *the wife's half* in entirely different terms—not terms of transfer but words descriptive of the termination of the husband's control and the cessation of his powers to interfere with her "full and exclusive possession, control and enjoyment." And throughout the opinion the Court took great pains to justify the tax as an excise on something other than a transfer, something best described as an accession of possession and control. See especially 326 U.S. at 352, 353-4 (so construing the *Tyler* and *Jacobs* cases) and 356-7. In this last portion of the opinion the Court likened the principles sustaining the tax under the 1942 community property amendment of the federal estate tax law to those on which it had upheld an early California inheritance tax on the wife's half interest, saying (326 U.S. at 357):

> "* * * But the levy upon the entire value of the community was sustained, not as a tax upon property or the transfer of it, but as a tax upon the 'vesting of the wife's right of possession and enjoyment arising upon the death of her husband,' which the Court deemed an appropriate subject of taxation, notwithstanding the contract, equal protection and due process clauses of the Constitution. * * *"

We submit that during the lifetime of both spouses, when the wife takes her previously vested half by court partition or other legal means or when the husband and wife voluntarily partition the property, there is just as clearly no "transfer" of *the wife's half* to her, but merely an "accession" to her of freedom from certain incidents. This accession includes, in the case of community property, freedom from the husband's sole control and sole possession and, in the case of joint tenancy property, freedom from the husband's possibility of survivorship and in some cases also freedom from his share in possession. This latter freedom, however, is only obtained where joint tenancy properties are divided in kind and the wife thus gets sole possession of her

separated half; but where the joint tenancy properties are partitioned into undivided interests held in tenancy in common—as was the situation with respect to most of the properties partitioned in this *Sullivan* case—no such freedom from the husband's share in possession is obtained by the wife because both husband and wife continue to share in possession as tenants in common just as they previously did as joint tenants.

If the accession of such incidents upon the husband's death is not a transfer by operation of law, as the Supreme Court says, how can the identical accession during the husband's lifetime be a transfer either by operation of law—in the case of a court partition—or by the acts of the parties—in other cases? The fundamental interest of the wife—her vested half interest which she acquired in this case when the property was first transferred into joint tenancy in 1922—has not been transferred by the partition; it has merely been freed of certain incidents of that type of property pertaining to the husband but not amounting to ownership.

This necessarily means that Section 811(c), which provides only for inclusion in the taxable estate of an interest in property as to which there has been a "transfer" simply cannot apply to such a partition, just as Section 810 which taxes a "transfer" at death cannot apply to the similar accession to the wife on the husband's death—Section 811(e)(1) being necessary to cover such accession. This, of course, does not mean that Congress could not tax the accession of incidents to the wife by reason of a partition undertaken in contemplation of death, if Congress chose to do so. We believe that such an extension of the present tax on transfers in contemplation of death to cover also a partition of the type involved in this case would be sustained as a constitutional excise tax for the same reasons that Section 811(e)(1) was sustained as an extension of the tax on transfers at death to cover accessions of incidents not amounting to transfers. But obviously an express statute would be necessary, just as Section 811(e)(1) was necessary to accomplish this result upon death.

It is therefore respectfully submitted that since the severance of the joint tenancy did not constitute a transfer by the decedent of the wife's one-half interest in the joint tenancy property, Section 811(c) does not apply so as to include in the decedent's gross estate the wife's interest in the property at the time of the partition.

IV. The Wife's Half of the Joint Tenancy Property Involved in Commuting the Property into Tenancies in Common or Partitioning It Between the Owners Is Not Includible in Decedent's Gross Estate Under Section 811(c), Because Section 811(c) Does Not Authorize the Inclusion in the Gross Estate of the Property Interest of Another Person in Property Transferred by the Decedent in Contemplation of Death.

It has just been argued, in the preceding section of this brief, that if the severance of the joint tenancy did not constitute a transfer by the decedent of his wife's interest in the joint tenancy property, there was no authority for including her property in the decedent's gross estate under Section 811(c) because that Section is only applicable to property *transferred* by the decedent. The Tax Court was probably aware of this because it did not say specifically in its opinion that the partition constituted a transfer by decedent to his wife of the wife's half interest. Instead of making any such statement, the Court simply proceeded on the assumption that the partition in some vague way came under Section 811(c) and that therefore the Court could ignore the whole transaction and treat the property as still being held in joint tenancy at the decedent's death, thus including all of it in his taxable estate under Section 811(e)(1) (see 10 T.C. at 973, R. 112). In attempted support of this tax treatment of the transaction the Tax Court cites certain authorities* which use

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***Igleheart v. Commissioner* (C.C.A. 5, 1935) 77 F.(2d) 704;
In re Kroger's Estate (C.C.A. 6, 1944) 145 F.(2d) 901;
Estate of Nathalie Koussevitsky (1945) 5 T.C. 650;
Estate of William Macpherson Hornor (1941) 44 B.T.A. 1136.

general language to the effect that the net result of including a transfer of property under Section 811(c) is to tax the property as though it had not been transferred at all but had been retained by the decedent until death. This is, in many cases, the practical result of applying Section 811(c)* and, where such is the result, there is perhaps no great objection to so expressing it, although obviously this is not what Section 811(c) actually provides, nor do any of the cases cited by the Tax Court say that it does. There is, however, great objection to taking such language out of its context and applying it to a case, such as we have here, where the result is very different from that prescribed by the statute. Section 811(c), when read with the introductory first paragraph of Section 811, provides that the value of the gross estate shall be determined by including the *value at death* of all property "to the *extent* of any *interest* therein *of which the decedent has* at any time *made a transfer* * * * in contemplation of * * * his death." The statute very specifically restricts the value of the property to be included to the interest which has been transferred. In other words, it is only the interest transferred in contemplation, as valued at death, that is includible.† In the *Sullivan* case the decedent at most only had a half interest in the joint tenancy property and, therefore, had he conveyed away his entire interest (which obviously he did not do), under Section 811(c) only his half would be includible. But the Tax

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*This is usually the result in those cases where, except for the transfer in contemplation, the tax at death would apply to property then transferred from the decedent. But where, as in the case of joint tenancies, the tax on the wife's half is not based on a transfer from the decedent to her (see discussion and cases at pages 30-40, above), but is an excise based upon the enlargement of her rights in her own share of the property, the result of disregarding the transfer in contemplation and treating the joint tenancy as continuing until death is very different from the one prescribed by the statute.

†The Commissioner's own regulations in effect so provide. See Regulations 105, Section 81.15, reading as follows:

> "If a portion only of the property was so transferred as to come within the terms of the statute, only a corresponding proportion of the value of the property should be included in ascertaining the value of the gross estate."

Court, by misapplying the language of the cases which speak loosely of treating the transfer as not having been made, gets the erroneous result of including, not only the "interest therein of which the decedent has * * * made a transfer * * * in contemplation of * * * his death," but the whole property, including the wife's half, on the false assumption that the joint tenancy continued until death. Obviously there is no warrant for this in the statute nor may the Tax Court properly so legislate.

It is one thing to say that a person who transfers property in contemplation of death may be considered to be the owner of that property up to the date of his death, but it is quite another thing to say that when a joint tenancy is terminated, the same cotency relationship between the transferor and another person may be deemed to continue until the date of the tranferor's death especially where the cotenant had the power and legal authority to change or terminate the relationship at any time. It seems obvious that Congress would not or could not tax the incidence of a relationship which might or might not have continued to date of death, on the assumption that it continued to death, when in fact it did not exist at date of death. In the case of *U. S. v. Jacobs,* supra, the Supreme Court in considering the question of the right of Congress to levy an estate tax upon the occasion of a joint tenant's acquiring the status of survivor at the death of a cotenant, pointed out:

> "Until the death of her cotenant, the wife could have severed the joint tenancy and thus have escaped the application of the estate tax of which she complains."

The effect of the Tax Court's decision in the *Sullivan* case is that the wife's participation in the severance of the joint tenancy property is completely ignored, and the severance is given a construction which forecloses her from the exercise of the very right which the Supreme Court stated that she had and that she could use until the death of her cotenant to escape the inclusion of the entire joint tenancy property in the gross estate. By her participation in the severance the wife merely took steps

toward the further enjoyment of a property ownership which she already possessed, so it must be obvious that the Tax Court's conclusion that this property should be included in her co-tenant's gross estate results in the inclusion in the decedent's gross estate of the property of another person. It has been held by the United States Supreme Court in the case of *Lang v. Commissioner* (1938) 304 U.S. 264 that unless the Statute clearly and specifically permits it, it is improper to tax the property interest of another person as part of the gross estate of the decedent.

In that case the Supreme Court considered the question whether proceeds of insurance on the life of the decedent, who was a resident of the State of Washington at the time of his death, were includible in the gross estate of the decedent where the premiums on the insurance policy were paid by the decedent out of community funds. The statute (Section 302 of the Revenue Act of 1926) provided that property should be included in the gross estate, "(g) to the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

After concluding that one-half of the community funds applied to the payment of the premiums was property of the wife, and that she became entitled to the proceeds of the policy in proportion to the amount so paid, the Court stated:

> "In the absence of a clear declaration it cannot be assumed that Congress intended insurance bought and paid for with the funds of another than the insured and not payable to the latter's estate, should be reckoned as part of such estate for purposes of taxation."

It would appear that even though the language of the statute, literally, was broad enough to cover all proceeds of insurance under policies taken out by the decedent on his life, the Court was of the opinion that only the decedent's property interest in

that insurance could be included in his gross estate, and that the general all-inclusive language of the Statute would not justify the taxation as part of the decedent's gross estate, of the property interest of another person in that insurance.

Just so in the case of a transfer of joint tenancy property by the joint tenants where one of the joint tenants is making the transfer in contemplation of death, it might well be concluded, on the analogy of the *Lang* case, that in the absence of a clear declaration it cannot be assumed that Congress intended that the property interest of another person in the joint tenancy property should be included in the gross estate of the decedent under the general language of Section 811(c) which provides for inclusion in the gross estate "to the extent of any interest * * * of which the decedent has at any time made a transfer * * * in contemplation of death * * *" In the *Sullivan* case the Tax Court included the property interest of the joint tenant, the wife, in the gross estate of the decedent, and it is respectfully urged that in the absence of any clear declaration in Section 811(c) that the property interest to be included in the gross estate, in the case of property transferred in contemplation of death, should include the property interest of another person in that property, the Tax Court erred in including in the decedent's gross estate the wife's interest in the property.

V. Section 811(c) Applies Only When an "Interest" in Property Is Transferred by the Decedent and No Such "Interest" Is Transferred When Joint Tenancy Properties Are Commuted into Tenancies in Common or Are Partitioned Between the Owners.

As we have demonstrated in parts I, II and III, above, after the severance of the joint tenancy decedent continued to own an undivided one-half interest in some of the property, and so did his wife. In four securities, the severance changed the former undivided one-half interest into a full ownership of a divided half. As demonstrated, the severance did not increase

the present rights of either party; it merely caused the relinquishment of an expectancy.

A. UNDER THE DECISIONS OF THE SUPREME COURT THE WORD "INTEREST," AS USED IN THE ESTATE TAX LAW, IS A WORD OF ART AND DOES NOT INCLUDE MERE EXPECTANCIES.

Section 811(c) applies only "To the extent of any *interest* * * * of which the decedent has at any time made a transfer * * * in contemplation of * * * death * * *." Thus the transfer of something not amounting to an "interest" does not bring Section 811(c) into application even if done in contemplation of death. Section 811(c) is not the only subdivision of Section 811 in which the word "interest" is used. Section 811(a), the basic subdivision, includes property in the gross estate "To the extent of the *interest* therein of the decedent at the time of his death." Since this quoted language and the previously quoted excerpt from Section 811(c) can both be traced back to the original estate tax statute enacted in 1916, the word "interest" undoubtedly has a corresponding meaning in each subdivision.

A power of appointment, even when coupled with an interest, is not an "interest" within Section 811(a). *United States v. Field* (1921) 255 U.S. 257, *Helvering v. Safe Deposit & Trust Co.* (1942) 316 U.S. 56. The *Field* case held that an exercised power of appointment coupled with what at common law is called an "interest," was not included in the taxable estate of the possessor of the power under the forerunner of Section 811(a). At that time this section contained three conditions to taxability: (1) the decedent must have an "interest" in the property; (2) the property must be subject to his debts; and (3) the property must be distributable as part of his estate. The Supreme Court held unanimously that though the second condition was satisfied, the first and third were not.

Helvering v. Safe Deposit & Trust Co., above, arose after the second and third requirements involved in the *Field* case had been repealed, so the power of appointment was taxable simply

if it was an "interest" of the decedent in property. The court, composed largely of its present members, reviewed the *Field* case and the history of the treatment of powers of appointment, and concluded that an unexercised power of appointment coupled with an interest was not an "interest" in property under Section 811(a) and accordingly was not included in the gross estate by virtue of that section.

It follows from these decisions that a power of appointment coupled with an interest is also not an "interest" within the meaning of that term in Section 811(c), as well as Section 811(a), so that a power of appointment coupled with an interest relinquished in contemplation of death would not be reached by Section 811(c). This has evidently been the Congressional understanding of Section 811(c), for when Congress subjected powers of appointment to the tax by adding a special subdivision, Section 811(f), it specifically wrote a contemplation of death clause into that section to bring into the estate powers of appointment relinquished in contemplation of death. See Section 811(f)(1).*

It is evident, then, that the word "interest" as used throughout Section 811 is a word of art, which does not include everything which conceivably might be characterized an interest at common law. This is not an unusual situation in the estate tax law. Cf. *United States v. Pelzer* (1941) 312 U.S. 399, relating to the term "future interests," and *Rogers' Estate v. Helvering* (1943) 320 U.S. 410, relating to the word "passing." Accordingly, in construing this word of art we start with the knowledge that it does not include one type of power in which the possessor has the right to income for life and the right to name the taker after his death, where these rights are not coupled with ownership in the ordinary sense. It should therefore not be surprising to find that it does not include a mere expectancy, in which none of these rights are present but are postponed to a contingency which may never happen.

*There is no like provision in Section 811(e), prescribing the tax consequences of owning property in joint tenancy at death.

B. THE TRANSACTION IN THIS CASE MERELY TERMINATED THE RIGHT OF SURVIVORSHIP IN THE JOINT TENANCY PROPERTIES AND THIS RIGHT WAS, AT MOST, A MERE EXPECTANCY AND NOT AN "INTEREST" AND THEREFORE THE TRANSACTION IS NOT WITHIN THE PURVIEW OF SECTION 811(c).

The courts characterized the rights of a California wife in community property acquired before July 29, 1927 as an expectancy.

> *United States v. Robbins* (1926), 269 U.S. 315;
> *Talcott v. United States* (C.C.A. 9, 1928) 23 F.(2d) 897, cert. den. 277 U.S. 604;
> *Henshaw v. Commissioner* (C.C.A. 9, 1929) 31 F.(2d) 946, cert. den. 280 U.S. 565.

In the two cases last cited this court held that with respect to such property the husband had the only taxable "interest" under Section 811(a), because, inferentially, the wife's expectancy did not amount to an "interest" on which she was taxable under Section 811(a). Argument is not necessary to demonstrate that the wife's expectancy in pre-1927 community conferred on her more present rights than, and as many future rights as, the joint tenant's expectancy gives him in the other tenant's half. Furthermore, we believe that it will not be questioned that if in contemplation of death a wife relinquished her expectancy in pre-1927 community property Section 811(c) would be without application, not only because she has not made a "transfer" (see part III, above), but also because what she has relinquished is not an "interest."'

In common law states, a wife's dower rights constitute an expectancy during her husband's lifetime, although they have greater legal protection against unilateral termination by the other party than the joint tenant's expectancy in the other tenant's half enjoys. We have found no case in which the Bureau of Internal Revenue has sought to question the obvious fact that a wife's dower rights are not an "interest" under Section 811(a) and Section 811(c).

A contingent remainder which is terminated by death is fundamentally a particular type of expectancy, and it also is not an "interest" for purposes of Section 811(a) and Section 811(c). *Commissioner v. Rosser* (C.C.A. 3, 1933) 64 F.(2d) 631; *Hamlin v. United States* (1928) 66 Ct. Cls. 501, 7 AFTR 8916; to the same effect see *Kinney's Estate v. Commissioner* (C.C.A. 9, 1935) 80 F.(2d) 568.

The right of survivorship is the right to succeed to the other joint tenant's interest if one outlives him. So long as both are alive, this right is entirely contingent and is a mere expectancy. It may be terminated by the unilateral action of the other joint tenant, without the consent or even against the will of his fellow tenant. If the expectancy ripens, it will not confer rights of enjoyment greater in kind than dower rights to do in many states after the death of the husband, or than the wife's pre-1927 community rights will after the death of the husband, or than a remainder will when it has vested in fee. And a comparison of present rights will favor pre-1927 community and dower. Accordingly, we submit, the right of survivorship to the interest of the other joint tenant is a mere expectancy, not an "interest" under Section 811(a) or Section 811(c).

This conclusion is borne out by the very existence of Section 811(e), relating to joint tenancies and tenancies by the entirety. Why did Congress enact this provision if the right of survivorship was an "interest" under Section 811(a) and Section 811(c)? If it was such an "interest," all the property subject to a joint tenancy would be includible in the gross estate under Section 811(a) even if Section 811(e) were not in the statutes; half of it would be taxable because the decedent owned it and therefore had the typical "interest" in it, and the other half would be taxable because as to it he had a right of survivorship which existed until the moment of his death. We submit that this structure of the statute compels the conclusion that the right of

survivorship is not an "interest" within Section 811(a) and Section 811(c).*

For these reasons, we submit that the right of survivorship which decedent relinquished was not an "interest" within Section 811(c). This conclusion is not destructive of the Congressional purpose. The estate tax rule respecting joint tenancies and tenancies by the entirety is a harsh one, since it reaches property already owned by the survivor. We believe that for this reason Congress was not concerned with the tax avoidance possibilities of severances of these types of tenancies but was satisfied to reach only those that continued until death. Only this conclusion can explain the fact that Congress wrote a contemplation of death clause into other special rules as an integral part of them,† but wrote none into the joint tenancy provision, Section 811(e).

CONCLUSION

It is respectfully submitted that the Tax Court's decision that the wife's half of the joint tenancy properties is includible in the decedent's gross estate simply cannot stand. Even if it be assumed that the agreement of November 24, 1943 was made by the decedent in contemplation of death, it is yet plain that, as to the property that had previously been joint tenancy property, his wife's half cannot be included in the gross estate under Section 811(c) because

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*The presence of Section 811(e) cannot be explained on the ground that it was necessary to give a home to the proviso in it under which joint tenancy property is not taxed in the estate of one who provided none of the consideration for its purchase. Had Section 811(a) been thought sufficient to tax the entire joint tenancy property, the proviso would have been added to it instead of writing a redundant subdivision. Moreover, a reading of Section 811(e) cannot leave doubt that Congress thought its general rule was an addition of substance to the statute. This section specifically refers to the "interest" of "decedent *and any other person,*" plainly showing that to reach the "interest" of decedent alone was not enough.

†Revocable transfers, Section 811(d)(1), (2) and (4); powers of appointment, Section 811(f)(1); special rule relating to community property in effect between 1942 and 1948, Section 811(d)(5) and Section 811(e)(2).

(1) as to that half the decedent has no "interest"—at most he had a mere expectancy, should he survive his wife;

(2) the agreement did not result in any "transfer" by the decedent of an interest in his wife's half of the property, but merely terminated the right of survivorship and left the property vested in her as before; and

(3) even had there been a "transfer" of an "interest" by the decedent in his wife's half of the property, the decedent received in return a consideration that was identical with whatever he transferred and therefore the transaction was a bona fide sale for an adequate and full consideration on both sides within the meaning of Section 811(c) and therefore is not taxable.

The decision of the Tax Court should be reversed.

Respectfully submitted,

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APPENDIX

The following are applicable provisions of the Internal Revenue Code as in effect during the period from November 1943 to January 1944, both inclusive:

"SEC. 810. RATE OF TAX.

A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 812) shall be imposed upon the transfer of the net estate of every decedent, citizen or resident of the United States, dying after the date of the enactment of this title. * * *"

[Table of rate brackets omitted.]

"SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) DECEDENT'S INTEREST.—To the extent of the interest therein of the decedent at the time of his death;

*　　*　　*　　*　　*　　*　　*

(c) TRANSFERS IN CONTEMPLATION OF, OR TAKING EFFECT AT DEATH.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

(d) Revocable Transfers.—

* * * * * * *

(5) Transfers of Community Property in Contemplation of Death, etc.—For the purposes of this subsection and subsection (c), a transfer of property held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse.

(e) Joint and Community Interests.—

(1) Joint Interests.—To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person:

Provided further, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

(2) COMMUNITY INTERESTS.—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

(f) POWERS OF APPOINTMENT.—

(1) IN GENERAL.—To the extent of any property (A) with respect to which the decedent has at the time of his death a power of appointment, or (B) with respect to which he has at any time exercised or released a power of appointment in contemplation of death, or (C) with respect to which he has at any time exercised or released a power of appointment by a disposition intended to take effect in possession or enjoyment at or after his death, or by a disposition under which he has retained for his life or any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall

possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth.

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(i) Transfers for Insufficient Consideration.—If any one of the transfers, trusts, interests, rights, or powers, enumerated and described in subsections (c), (d), and (f) is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.